ORIGINAL

IN THE SUPREME COURT OF FLORIDA

TERRY HYDEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,966

AMENDED PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender

SUSAN D. CLINE
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 377856
Attorney for Terry Hyden
The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

CERTIFICATE OF TYPE FONT AND POINT SIZE

I HEREBY CERTIFY that the instant brief was prepared in 12 point Courier New type, a font that is not spaced proportionately.

Susan M Clise

Attorney for Terry Hyden

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PRELIMINARY STATEMENT

Petitioner, Terry Hyden, was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida, and the Appellant in the Fourth District Court of Appeal. He will be referred to by name or as Petitioner in this brief. Respondent was the Prosecution in the trial court and the Appellee in the district court.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote the Record on Appeal documents.

The symbol "T" will denote the Record on Appeal transcripts.

The symbol "RB" will denote the Respondent's Brief on the Merits.

The symbol "App." will denote the Appendix to Petitioner's Brief on the Merits.

ARGUMENT

POINT I

THE INSTANT DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH *NEAL V. STATE*, 688 SO. 2D 392 (FLA. 1ST DCA), *REVIEW DENIED*, 698 SO. 2D 543 (FLA. 1997), ON THE SAME QUESTION OF LAW.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL IN *HYDEN V. STATE*, 715 SO. 2D 960 (FLA. 4TH DCA 1998)(*EN BANC*), ERRONEOUSLY IDENTIFIED TOO NARROW A CLASS OF SENTENCING ERRORS WHICH IT WILL CONSIDER ON APPEAL WITHOUT PRESERVATION IN THE TRIAL COURT.

Petitioner primarily relies on the arguments and authorities contained in Petitioner's Brief on the Merits for thorough discussion of these issues.

However, Petitioner, as also set forth in "Petitioner's Response To Respondent's Motion To Dismiss For Lack Of Jurisdiction," strenuously disagrees with Respondent's contention that this Court lacks jurisdiction over this cause.

Petitioner recognizes that on the same date Petitioner's Brief on the Merits was served, October 21, 1998, the First District receded from the portion of the court's opinion in *Neal v. State*, 688 So. 2d 392 (Fla. 1st DCA), *review denied*, 698 So. 2d 543 (Fla. 1997), which held that the failure to give notice to an individual

defendant of the potential imposition of statutorily authorized public defender's fees at the time of sentencing constitutes fundamental error. *Locke v. State*, 719 So. 2d 1249 (Fla. 1st DCA 1998). However, even if the First District's decision in *Locke* resolved the conflict between the First and the Fourth on that narrow issue, Petitioner strenuously disagrees with Respondent's assertion that no conflict exists as a result of the First District's decision in *Locke*.

Numerous other bases for jurisdiction are presented by the instant decision. These conflicts were set forth at length in Petitioner's Brief on the Merits (and in his response to Respondent's motion to dismiss) as additional grounds for this Court to accept jurisdiction and quash *Hyden v. State*, 715 So. 2d 960 (Fla. 4th DCA 1998).

If this Court determines that the *Locke* decision has resolved the certified conflict, Petitioner respectfully requests that this Court accept jurisdiction on the basis of the other grounds as set forth in his Brief on the Merits, in his response and herein. Petitioner's ability to seek review in this cause should not be foreclosed merely because of the recent shift in the First District's position. Had the Fourth not certified conflict with

Neal, Petitioner would have sought review in this Court on these grounds.

This Court thus has jurisdiction pursuant to Article V, Section 3(b)(3) of the *Florida Constitution*. This Honorable Court should accept jurisdiction and quash the instant decision as the opinion in is direct and express conflict on other points of law with numerous other decisions of this Court and other district courts of appeal as set forth below.

The initial issue presented is whether the wrongful imposition of public defender fees and costs constitutes fundamental error which may be challenged on direct appeal without having been presented to the trial court. In the instant cause, the Fourth District Court of Appeal erroneously held that the improper imposition of public defender fees and costs does not constitute fundamental error. Petitioner contends that the *Neal* decision was correctly decided on the authority of this Court's decision in *Wood v. State*, 544 So. 2d 1004 (Fla. 1989)(it is fundamental error to order a criminal defendant to pay attorney's fees without affording adequate notice and an opportunity to be heard, and thus, that the issue may be raised on appeal notwithstanding the fact that it was never presented to the trial court). The fundamental due process

tenets upon which *Wood* was based remain unchanged in the aftermath of the enactment of the Criminal Appeal Reform Act of 1996 and the ensuing rules amendments. Further, Section 924.051(3), *Florida Statutes*, **specifically** states that instances of fundamental error may be raised on appeal.

As this Court has determined that it is fundamental error to order a criminal defendant to pay attorney's fees without affording adequate notice and an opportunity to be heard, therefore, that issue may be raised on appeal notwithstanding the fact that it was never presented to the trial court. *See Wood*. As the instant decision is in conflict with *Wood*, this Court should accept jurisdiction and quash *Hyden*.

However, the issue at bar was **not** the trial court's failure to provide Mr. Hyden with prior notice and an opportunity to be heard. At the sentencing hearing, the trial court determined that a lien should be entered for the public defender fees and costs. Nevertheless, in addition to the entry of a lien, due to a ministerial error, the written order of probation erroneously included the requirement that Mr. Hyden pay the fees and costs (termed "restitution") as **conditions of his probation**. The Fourth District apparently decided the above fundamental error issue as

the district court also held that it would no longer correct unpreserved errors where a written order failed to conform to the trial court's oral pronouncement (except apparently in the case of fundamental error).

Thus, the *Hyden* court held that this issue was not fundamental error in the context of considering it a sentencing error: "In this district, we will no longer entertain on appeal the correction of sentencing errors which are not properly preserved. In this case, the appellant challenges two aspects of his sentence." *Hyden v. State*, 715 So. 2d at 961.

The instant decision is in conflict with holdings of this Court that an illegal sentence may be raised on appeal without preservation below. *State v. Mancino*, 710 So. 2d 159 (Fla. 1998); *Davis v. State*, 661 So. 2d 1193, 1196-97 (Fla. 1995). The scrivener's errors at bar resulted in the imposition of **additional** unpronounced conditions of probation which required payment of public defender fees and costs and that Mr. Hyden submit to blood and breath testing. As such imposition constituted an unconstitutional enhancement of a sentence, the resulting sentence is an illegal sentence that is fundamental error that can be raised in a direct appeal under the definition set forth in *State v.*

Mancino. *See* § 924.051(3); *Hopping v. State*, 708 So. 2d 263, 265 (Fla. 1998); *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994); *Nelson v. State*, 719 So. 2d 1230 (Fla. 1st DCA 1998).

Thus, the challenged order of probation where scrivener's errors resulted in the imposition of additional unpronounced conditions of probation created an illegal sentence. The *Hyden* decision is thus in conflict with *Davis*, *Mancino* and *Hopping* on this point.

Further, the Fourth District erroneously identified too narrow a class of sentencing errors which it will consider on appeal without preservation in the trial court: preserved sentencing errors, fundamental errors and illegal sentences as defined in *Davis v. State*, 661 So. 2d 1193. Thus, on this point also, the instant decision is in conflict with this Court's recent decision in *State v. Mancino*, 714 So. 2d 429, and numerous other decisions of this Court and the district courts of appeal. In *State v. Mancino*, this Court clarified its holding in *Davis v. State* as follows:

> As is evident from our recent holding in *Hopping* [*Hopping v. State*, 708 So. 2d 263 (Fla. 1998)], we have rejected the contention that our holding in *Davis* mandates that *only* those sentences that facially exceed the statutory maximums may be challenged under

> rule 3.800(a) as illegal...A sentence that patently fails to comport with statutory or constitutional limitations is by definition "illegal".

Id. at 433. The errors at bar also fall within the *Mancino* definition and thus, the instant decision conflicts with *Mancino* on this point.

The Fourth District's decision is also in conflict with a long line of cases both prior to and after the enactment of the Criminal Appeal Reform Act of 1996 and the ensuing rules amendments holding that a trial court's oral pronouncement controls over an inconsistent written order and that such ministerial error may be raised on direct appeal despite the absence of an objection in the trial court. *See State v. Williams*, 712 So. 2d 762 (Fla. 1998) (decided post-CARA; there is a judicial policy that the actual oral imposition of sanctions should prevail over any subsequent written order to the contrary); *Justice v. State*, 674 So. 2d 123, 125 (Fla. 1996); *Walker v. State*, 701 So. 2d 401, 402 (Fla. 5th DCA 1997); *Smith v. State*, 705 So. 2d 1033 (Fla. 3d DCA 1998); *Smith v. State*, 711 So. 2d 100 (Fla. 1st DCA 1998); *Kelly v. State*, 414 So. 2d 1117 (Fla. 4th DCA 1982); *Davis v. State*, 677 So. 2d 1366 (Fla. 4th DCA 1996); *Allen v. State*, 640 So. 2d 1198 (Fla. 4th DCA 1994); *Kord v. State*, 508 So. 2d 758 (Fla. 4th DCA 1987);

Thomas v. State, 595 So. 2d 287 (Fla. 4th DCA 1992); *Baker v. State*, 676 So. 2d 1050 (Fla. 3d DCA 1996); *Jackson v. State*, 707 So. 2d 775 (Fla. 2d DCA 1998); *Joly v. State*, 702 So. 2d 569 (Fla. 2d DCA 1997); *Anderson v. State*, 616 So. 2d 200 (Fla. 5th DCA 1993); *Rowland v. State*, 548 So. 2d 812 (Fla. 1st DCA 1989); *Farmer v. State*, 670 So. 2d 1143 (Fla. 1st DCA 1996); *Marcinek v. State*, 662 So. 2d 771, 772 (Fla. 4th DCA 1995); *Drumwright v. State*, 572 So. 2d 1029, 1031 (Fla. 5th DCA 1991); *Flowers v. State*, 351 So. 2d 387 (Fla. 1st DCA 1977); *Briseno v. Perry*, 417 So. 2d 813 (Fla. 5th DCA 1982), *review denied*, 427 So. 2d 736 (Fla. 1983); *Luhrs v. State*, 394 So. 2d 137 (Fla. 5th DCA 1981); *Sawyer v. State*, 94 Fla. 60, 113 So. 736 (1927); *D'Alessandro v. Tippins*, 98 Fla. 853, 124 So. 455 (1929).

Thus, the *Hyden* court's ruling that it will no longer correct unpreserved and nonfundamental errors where, due to a scrivener's error, a written order fails to conform to the trial court's oral pronouncement conflicts at a minimum with the numerous cases set forth above. This Honorable Court should also accept jurisdiction on this basis and quash *Hyden*.

In addition, Petitioner submits that the well-settled law in Florida that sentencing errors apparent on the face of the record

may be corrected on direct appeal is still viable despite the Criminal Appeal Reform Act of 1996 and ensuing rules changes. *See Davis v. State*, 661 So. 2d 1193; *State v. Rhoden*, 448 So. 2d 1013 (Fla. 1984); *State v. Montague*, 682 So. 2d 1085 (Fla. 1996). Significantly, in a case decided since the enactment of the Criminal Appeal Reform Act, *State v. Montague*, 682 So. 2d at 1088, this Court held:

> We have repeatedly held that absent an illegal sentence or an unauthorized departure from the sentencing guidelines, [footnote omitted] only sentencing errors "*apparent on the face of the record* do not require a contemporaneous objection in order to be preserved for review."...By our decision today, we again emphasize that the sentencing hearing is the appropriate time **to object to alleged sentencing errors based upon disputed factual matters.**

(Emphasis supplied). *Hyden* thus conflicts with *Davis*, *Mancino* and *Montague* on this point.

Further, in addition to many other decisions, the instant decision conflicts with the recent decision of the Second District Court of Appeal in *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998). In *Denson*, the Second District held, in part:

> Notwithstanding the broad language in section 924.051(3), we hold that when this court otherwise has jurisdiction in a criminal appeal, it has discretion to order a trial

> court to correct an illegal sentence or a serious, patent sentencing error that is identified by appellate counsel or discovered by this court on its own review of the record. To rule otherwise would be contrary to the intent and goals of the Criminal Appeal Reform Act and would raise substantial constitutional concerns undermining the integrity of the courts.

Id. at 1226.

Thus, the *Hyden* decision is in direct and express conflict with numerous decisions of this Court and other district courts on several points of law.

In addition, Petitioner finds he must also clarify the factual circumstances that actually occurred below in light of a number of inaccuracies contained in Respondent's Brief on the Merits [1] (RB 5-6).

First, Respondent apparently is attempting to suggest by the juxtaposition in its brief of a comment that the trial court was discussing conditions of probation when the assistant public defender tendered a judgment on public defender fees and costs,

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[1] Petitioner notes that this brief was entitled in error "Petitioner's Brief on the Merits" by Respondent. Indeed, in addition to the other inaccuracies corrected hereafter in this brief, Petitioner notes that Respondent has stated in its Preliminary Statement that the county of origin is Broward County, rather than Indian River County, giving Petitioner cause to ponder whether Respondent's brief was prepared to specifically address the instant case.

that the trial court intended to require that Petitioner pay public defender fees and costs as conditions of probation. However, this overlooks the fact that the record clearly reflects that the court orally directed only that a final judgment would be entered for public defender fees and costs (SR 11-12) and one was (R 47). In addition, however, the written order of probation also included conditions requiring petitioner to pay $42 in "restitution" for deposition costs to the Board of County Commissioners and $200 in public defender fees (R 35). An "Order on Charges/Cost/Fees" included the same assessments (R 46).

Further, Respondent stated in its brief that "Petitioner alleged in the district court that he did not receive notice that the fees and costs would be conditions of probation, and that the oral pronouncement did not conform to the written sentence. Petitioner argued that the sentence was illegal." (RB 6). This is absolutely incorrect.

In actuality, on direct appeal to the Fourth District Court of Appeal, in the second point raised, Mr. Hyden challenged ministerial or scrivener's errors where the written order of probation and the written order on charges/costs/fees did not conform to the trial court's oral pronouncements at the sentencing hearing. As set forth previously, as the trial court never ordered

Petitioner to pay $200 in public defender fees and $42 in costs as conditions of probation when it orally pronounced sentence, Petitioner challenged the written order of probation which included these conditions and the order on charges/costs/fees on direct appeal on the basis that the written orders did not conform to the trial court's oral pronouncement that a lien would instead be entered. Second, also due to a scrivener's error, special condition 15 in the written order of probation contained a requirement that Petitioner submit to random breath and blood testing at any time requested by his officer or the professional staff of any treatment center where he received treatment (R 36). At sentencing, the trial court did not orally impose this condition. Rather, the court ordered Petitioner to submit only to periodic urinalyses as a special condition of probation (SR 11). On direct appeal, Petitioner also challenged this condition of his probation on the basis that the written order of probation did not conform to the trial court's oral pronouncement.

In addition, in noting in it's brief what Respondent purportedly argued below, Respondent failed to note that any arguments made by Respondent below were made **only** on rehearing after the Fourth District initially decided this case (RB 6). In actuality, Respondent failed to respond at all in opposition to the

scrivener's errors raised by Petitioner in his Initial Brief when Respondent had the opportunity to do so in its Answer Brief. Indeed, the Fourth District Court of Appeal initially found in favor of Petitioner and had remanded for the trial court to correct the ministerial errors in the order of probation and order on charges/costs/fees as the written orders did not conform to the trial court's oral pronouncements (App. 1). Respondent moved for rehearing, rehearing *en banc* or certification of conflict, castigating the Fourth District for *sua sponte* reversing as to the ministerial errors apparent on the face of the record (App. 2-7). Even when filing its motion for rehearing, Respondent had still not realized that Petitioner had raised these issues on direct appeal and Respondent had failed to respond to the issues in its Answer Brief.

Finally, the facial validity of a statute can be raised for the first time on appeal. *See Trushin v. State*, 425 So. 2d 1126, 1129-1130 (Fla. 1982). In addition, as noted previously, whether the application of the Criminal Appeal Reform Act precluded review of these ministerial errors on direct appeal was not even argued by Respondent until Respondent filed his motion for rehearing, rehearing *en banc* or certification of conflict after the Fourth

District of Appeal issued its original decision in this case, and thus the issue of the constitutionality of the statute was not an issue at bar prior to that time.

Therefore, this Honorable Court should **quash** the instant decision of the Fourth District Court of Appeal and remand the instant cause with directions to reverse and remand for the entry of written orders in conformance with the trial court's oral pronouncements.

CONCLUSION

Based on the arguments and authorities contained herein, Respondent urges this Honorable Court to accept jurisdiction and **quash** the instant decision of the Fourth District Court of Appeal and remand with appropriate directions.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

SUSAN D. CLINE
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 377856
Attorney for Terry Hyden
The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Assistant Attorney General Celia Terenzio, Assistant Attorney General Ettie Feistmann and Assistant Attorney General Elaine Thompson, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33401-2299 by courier this 1st day of February, 1999.

Susan L Clark

Attorney for Terry Hyden

STATE OF FLORIDA
Office of the Public Defender
FIFTEENTH JUDICIAL CIRCUIT
Criminal Justice Building
421 3rd Street
West Palm Beach, Florida 33401

RICHARD L. JORANDBY
Public Defender

Telephone (561) 355-7500

February 1, 1999

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927

Re: *Terry Hyden v. State of Florida*
Supreme Court Case No. 93,966

Dear Mr. White:

Please find enclosed the Amended Petitioner's Reply Brief on the Merits, which conforms to the 15-page limitation for reply briefs, with (7) copies for filing in the above-styled cause with this Honorable Court. Also, find enclosed this brief on a diskette in WordPerfect 6.1.

Thank you.

Sincerely,

Susan D. Cline

SUSAN D. CLINE
Assistant Public Defender

SDC:nvc

Enclosures

cc: Ettie Feistmann, Esq.
Celia Terenzio, Esq.
Elaine Thompson, Esq.